Supreme Court, U.S.
FILED
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KENNETH OWEN and MARGARET OWEN,

Petitioners,

V.

UNITED STATES OF AMERICA
(DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE),

Respondents,

On Petition For Writ Of Certiorari
To The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in denying petitioner's request for publication?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, KENNETH and MARGARET OWEN, respectfully prey that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit denying a request for publication of the Court's unpublished disposition in this matter.

OPINIONS BELOW

The unpublished written Findings of Fact and Conclusions of Law of the United States Bankruptcy Court for the Northern District of California, appears in Appendix A to this Petition. The unpublished Memorandum Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals Order denying a request for publication was filed on February 3, 1995 and is set forth in Appendix D. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed February 13, 1995. The Court of Appeals Order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc was issued March 9, 1995 and is set forth in Appendix E.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Ninth Circuit Rule 36-1, Ninth Circuit Rule 36-2, Ninth Circuit Rule 36-3, and Ninth Circuit Rule 36-4 is set forth in Appendix F.

STATEMENT OF THE CASE

The United States Bankruptcy Court for the Northern District of California had jurisdiction pursuant to 28 U.S.C. section 157. The United States Bankruptcy Appellate Panel of the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. section 158(b). The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. section 158(d).

Debtors Kenneth and Margaret Owen filed a Chapter 7 petition on April 8, 1985, in the United States Bankruptcy Court for the Northern District of California. During the pendency of that case and prior to final discharge, the Internal Revenue Service rendered assessment of taxes against the Owens. The Owens asserted in an adversary complaint filed on October 2, 1991, that the assessments violated the automatic

stay pursuant to 11 U.S.C. section 362(a)(6), which prohibits assessments once the stay is in effect.

After a full consideration of the testimony and documents offered in evidence, the Court ruled in favor of the Internal Revenue Service on the basis that General Order No. 4 was valid, or at least enforceable, as of the date of the assessment of Federal taxes, and that the Owens did not challenge the validity of the order within a reasonable period of time thereafter.

> "Accordingly, the IRS had a right to rely upon its validity without having to engage in speculation as to whether it really was valid. And having that entitlement, those assessments and the relief from the stay that the order gave the IRS were valid."(See Appendix A, page 6)

The Owens appealed to the United States Bankruptcy Appellate Panel of the

Ninth Circuit. In an unpublished opinion the Bankruptcy Appellate Panel found that General Order No. 4:

"[a]utomatically modified the stay circumventing the procedures clearly enumerated in Fed.R.Bankr.P. 4001.

In addition, pursuant to 11 U.S.C. 362(d), a modification of the stay shall occur only after notice and a hearing. General Order #4 ignores this text. Instead, according to General Order #4, no motion, no notice, and no hearing is required before the stay is modified. Consequently, General Order #4 is procedurally inconsistent with the general bankruptcy rules and the specific requirements of 362(d)."

(See Appendix B, page 14)

"In conclusion, we reverse the bankruptcy court's decision concerning the IRS tax assessment. The IRS tax assessment violated the automatic stay

and is void. As such, the resulting tax calims are invalid . . .

We remand this case, however, to permit the bankruptcy court the opportunity to annul the automatic stay to grant relief to the IRS on equitable grounds." (See Appendix B, CONCLUSION)

The United States of America and the Owens both appealed to the United States Court of Appeals for the Ninth Circuit.

In an unpublished MEMORANDUM disposition, the Court of Appeals AFFIRMED for the reasons set forth in the Bankruptcy Appellate Panel's unpublished opinion. The unpublished MEMORANDUM disposition filed on December 06, 1994 appears in Appendix C. See also In re Owen; U.S. v. Owen, 42 F.3d 1401.

A timely request for publication was filed on January 23, 1995. (See Appendix F, Ninth Circuit Rule 36-4) The United States of America did not file any

objections to the Owen's request for publication. An ORDER was filed on February 3, 1995 denying the request for publication. (See Appendix D) A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed on February 13, 1995. An ORDER was filed on March 9, 1995 denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc. (See Appendix E)

REASONS FOR GRANTING THE WRIT

This case clearly meets the criteria for publication and reaches far beyond the cause at hand. The Court of Appeals abused its discretion in denying publication. Not publishing this case will have the same effect as validating illegal tax assessments.

This case is appropriate for publication because it establishes, alters, modifies or clarifies a rule of

law (Ninth Circuit Rule 36-2(a)), calls attention to a rule of law which appears to have been generally overlooked (Ninth Circuit Rule 36-2(b)), and involves a legal and factual issue of unique interest and substantial public importance (Ninth Circuit Rule 36-2(d)).

New Rules of Law (Circuit Rule 36-2(a)):

1. A general order which automatically modifies the automatic stay is a local bankruptcy rule, and as such, must be consistent with the Federal Rules of Bankruptcy Procedure.

2. A general order that conflicts with the general bankruptcy rules and specific code provisions is void ab initio and of no legal effect.

   The Bankruptcy Appellate Panel indicated that "Bankruptcy rule 9029 allows for the making of local bankruptcy rules so long as they are not 'inconsistent' with the more general bankruptcy rules." In re

Bersher Investments, 95 B.R. 126, 129 (9th Cir. BAP 1988) The holding in In re Bersher was that the local bankruptcy rule was not inconsistent with the general bankruptcuy rules. The present case clarifies what effect a local bankruptcy rule would have once it has been determined to be inconsistent with the general bankruptcy rules, i.e., void and of no effect.

3. Tax assessments that are based on a void general order are also void ab initio and of no legal effect. The assessments were made without legal authority, and consequently the tax assessments are illegal.
4. Relief from the automatic stay can only occur after a motion, notice, and a hearing.
5. The validity of a local rule or the violation of the automatic stay can be challenged at any time. The

validity of General Order NO. 4 was challenged almost ten years after it was first promulgated. Laches cannot validate a void local rule. The validity of the tax assessments were challenged more than six years after first being assessed. Laches cannot validate an illegal tax assessment.

Overlooked Rules of Law (Circuit Rule 36-2(b)):

General Order No. 4 had the appearance of being valid for a period of over four years and no one questioned the validity of this local rule. General Order No. 4 was not even challenged until five years after it had been rescinded. If this debtor had not questioned the validity of this local rule, it would have remained an apparently valid order. A local rule promulgated without the proper authority is not merely voidable, but absolutely void, yet will remain

apparently valid unless challenged.

Legal and Factual Issues of Unique Interest and Substantial Public Importance (Circuit Rule 36-2(d)):

The IRS believed they had a right to rely on the validity of General Order No. 4. For more than four years the IRS assessed taxes without any regard to the automatic stay in bankruptcy cases. It is suggested that hundreds if not thousands of taxes were illegally assessed in the Northern District of California between 1982 and 1986.

The case at hand could have national significance. The Government stated in their opening brief that the "Panel's erroneous characterization of the gerneral order as void, if not corrected, could have far-reaching significance. As we have noted, note 7 supra, 37 federal districts have adopted similar general orders and local rules that modify the automatic stay to permit

the Government to assess some taxes during bankruptcy proceedings. Assessments have been routinely made in reliance on those orders and rules, and the amount of assessed (and otherwise undisputed) tax liabilities that would be in peril can be expected to be very substantial."

> "While the IRS argued that equitable principles, in light of the large sums at stake, required that the district court's order be affirmed, the court wrote: 'We are unable to discover any differences in the applications of the rules of law or equity in tax cases, whether the government's claim be for $100 or $10,000,000.'Id at 156." Philadelphia & Reading Corp. v. U.S., 944 F.2d 1063, 1071 (3rd Cir. 1991), citing Ventura Consolidated Oil Fields v. Rogan, 86 F.2d 149, 156 (9th Cir. 1936).

The Court of Appeals abused its discretion by not publishing this case. Ninth Circuit Rule 36-2 provides that a written, reasoned disposition SHALL be designated an OPINION if it meets the criteria for publication. The Court of Appeals own local rule allows for no

discretion on the part of the Court to publish. If the case meets the criteria for publication, then the Court of Appeals shall write a reasoned disposition designated as an OPINION. Furthermore, Ninth Circuit Rule 36-1 provides that all opinions are published.

> [2,3] We agree with the Fifth Circuit's observation that "[u]se of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made." Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977). City of Edmonds v. United States Dept. of Labor, 749 F.2d 1419, 1421 (9th Cir. 1984) ALARCON, Circuit Judge.
>
> Our conclusion that the word "shall," is mandatory is fully supported by the decision of the Supreme Court in Mohasco Corp. v. Silver, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). Id. at 1422

The Court of Appeals requires strict compliance with its local rules. See In re Grand Jury Proceedings, 662 F.2d 532, 533, note 1, (9th Cir. 1981). This case clearly meets the criteria for publication. The United States of America has offered no objection to

publication, and the Court of Appeals has provided no reason to justify its action. "Even more important in our view, however, than these deficiencies in the record is the failure of the Court of Appeals to attempt to supply any reasoned justification for its action." Will v. United States, 389 U.S. 90, 104 (1967)

"Regular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance." Missouri v. Jenkins, 495 U.S. 33, 50 (1990)

Publication reaches far beyond the cause at hand. Non publication is tantamount to a cover up in which the IRS would enjoy a complete windfall by collecting taxes that are based on illegal assessments. Since General Order No.4 is void, every tax assessment based on that void rule, would also be void. Unfortunately, the IRS is not going to

notify debtor/taxpayers that that the IRS has assessed taxes illegally. The IRS is not going to voluntarily refund taxes that have been collected as a result of those illegal tax assessments.

> "The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. United States v. State Bank, 96 U.S. 30 [24 L.Ed.647]. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights.": 295 U.S., at 261, 55 S.Ct., at 700. U.S. v. Dalm, 110 S.Ct. 1361, 1370-71 (1990) (STEVENS, J., dissenting)

Many taxpayers will be without a remedy because of the statute of limitations in claiming refunds. Our delay in not discovering the illegal assessments has worked to the financial benefit of the IRS.

> Second, section 6511 (a) provides that if a taxpayer is required to file a return with respect to a tax, such as the gift tax, the taxpayer must file any claim for refund within three years from the time the return was filed or two years from the time

> the tax was paid, whichever period expires later. Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by section 6511(a), a suit for refund, regardless of whether the tax is alleged to have been "erroneously," "illegally," or "wrongfully collected." sections 1346(a)(1), 7422(a), may not be maintained in any court. See United States v. Kales, 314 U.S. 186, 193, 62 S.Ct. 214, 217, 86 L.Ed. 132 (1941). U.S. v. Dalm, 110 S.Ct. 1361, 1365 (1990).
>
> [T]he very purpose of statutes of limitation in the tax context is to bar the ascertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar. Id. at page 1369, note 7.

Unless this case is published, taxpayers will not be allowed to cite this case as precendent, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See Ninth Circuit Rule 36-3. However:

> [n]onmutual offensive collateral estoppel is unavailable against the government. National Medical Enterprises v. Sullivan, 916 F.2d 542, 545 (9th Cir. 1990), cert. denied, -- U.S. --, 11 S.Ct. 2014, 114 .Ed.2d 100 (1991). Our rule against citation of unpublished dispositions prevents, among other things, every unpublished disposition unfavorable to the government from being effectively "published" by the collateral estoppel exception to Rule 36-3. In re Burns, 974 F.2d 1064, 1067 (9th Cir. 1992) Before: ALARCON, HALL, and KLEINFELD, Circuit Judges.

The action of the Circuit Judges in the case at bar to deny publication was an intentional and deliberate act to conceal from the general public illegal tax assessments resulting from a void general order. "If a tree falls in the forest and no one hears it, has it made a sound?" If an Order is declared void and no one hears it, is it still valid? As an illusion, General Order No. 4 will remain valid in the eyes of the general public. The United States of Ameerica will profit greatly from this illusion.

> [T]hat decision not to publish the opinion or permit it to be cited-like

the decision to promulgate a rule spawning a body of secret law-was plainly wrong.1/ The County of Los Angeles Et Al. v. Kling, 474 U.S. 936, 938 (STEVENS, J., dissenting)

Stability and predictability are essential factors in the proper operation of the rule of law. In Maragne v. States Marine lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Supreme Court states the reasons for following past decision:

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaing public faith in the judiciary as a source of impersonal and reasoned judgments.

Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981)

In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future . . . County of Los Angeles Et Al. v. Kling, 474 U.S. 936, 940, n.6(STEVENS, J.,dissenting)

CONCLUSION

I submit that this case meets the criteria for publication as set forth in Ninth Circuit Rule 36-2. For the reasons set forth above, a writ of certiorari should issue to review the ORDER of the Court of Appeals in this matter.

DATED: June 7, 1995

Respectfully submitted,

Kenneth Owen

KENNETH OWEN

APPENDIX A

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re:	)	
	)	Case No.
KENNETH & MARGARET OWEN,	)	4-85-01124 WS
	)	
Debtors.	)	
	)	
	)	
KENNETH & MARGARET OWEN	)	
	)	Adversary
Plaintiffs,	)	Proceeding No.
	)	91-4466 AN
v.	)	FILED
	)	JUL 01 1992
CALIFORNIA STATE BOARD	)	BANKRUPTCY
OF EQUALIZATION, ET AL.	)	COURT
Defendants.	)	OAKLAND,
	)	CALIFORNIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial on the merits was held in the above adversary proceeding on March 30, 1992 and was continued to May 4, 1992 at 10:00 a.m. Morgan King appeared for the plaintiffs, Joyce Hee, Deputy Attorney General, appeared on behalf of the State Board of Equalization, and Robert Towler appeared for the Internal Revenue Service.

The issues as to both the IRS and

the State Board of Equalization are whether they assessed taxes in violation of the automatic stay and whether their claims for taxes are now barred by the Statute of Limitations.

To summarize the facts, debtors filed a Chapter 7 petition on April 8, 1985 and received a discharge on August 13, 1985. The schedules listed both the IRS and the State Board of Equalization as priority creditors.

On April 26, 1985, the debtors filed self-declared quarterly sales and use tax returns for the third and fourth quarters of 1985 and the first quarter of 1986. These returns were filed late and without remittance.

In May of 1985, the debtors filed their employer's federal tax returns for the third quarter of 1983 through the fourth quarter of 1984, and also filed federal unemployment returns for 1983 and 1984.

In June and July of 1985, the IRS assessed the amounts reflected in debtors' employer and unemployment tax returns. At that time, General Order #4 was in effect. That order granted the IRS relief from the automatic stay in order to permit it to assess voluntarily-agreed-to tax liabilities. Subsequently, in 1986, General Order #4 was rescinded.

As to the State Board of Equalization, under California sales and use tax law, a perfected and enforceable state tax lien arises automatically by operation of law when the tax becomes due and payable. That's pursuant to Revenue and Tax Code Section 6757. Delinquent sales and use tax return amounts are due and payable when the tax return is received by the State Board pursuant to 6757(b)(2). The State Board received debtors' tax returns before their discharge was entered.

The Ninth Circuit's recent decision

in In re King, 1992 U.S. App. Lexis 6848, indicates that the automatic imposition of a state tax lien was "an assessment" that violated the automatic stay. In King, the Ninth Circut addressed the issue of when California assesses an income tax deficiency for purposes of Section 507 and 523 of the Bankruptcy Code. The Court's analysis adopted the Bankruptcy Appellate Panel's discussion of the meaning of "assessment." The Bankruptcy Appellate Panel and the Ninth Circut stated that to assess refers to a formal act of fixing tax liability, and noted that a tax statute that immediately imposes a tax lien is an assessment.

This is exactly what we have here. Section 6757 fixed, i.e., assessed, the debtors' tax liability and created a tax lien when the State Board received their tax returns. Both the assessment and the tax lien violated the automatic stay. Absent a valid assessment and lien, the

sales and use tax claim is barred by the statue of limitations.

Section 6711 of the Revenue and Tax Code authorizes the state to collect delinquent taxes at any time within three years after the tax becomes due and payable or within the period during which a lien is enforced as a result of the recording or filing of a notice of tax lien. Since no lien was ever enforced, the State Board is limited to the three year period after the tax became due and payable. The statute ran in 1988.

The State Board argues that since the statute automatically imposed a lien, there was no assessment. As I've already indicated, I don't agree. I find that collection of state taxes is now time-barred.

As to the IRS, there's no question that General Order #4 was valid, or at least was enforceable, as of the date of the assessment of the federal taxes.

Debtors did not challenge the validity of that order prior to its rescission. Moreover, there was not even a challenge within a reasonable period of time thereafter.

In the absence of any order from this court or any other court making General Order #4 invalid or declaring it to be invalid, General Order #4 was valid when these taxes were assessed. And no matter what hindsight may say about the validity of that order or the wisdom of putting it into effect, it was in effect, and no one challenged its validity at the time.

Accordingly, the IRS had a right to rely upon its validity without having to engage in speculation as to whether it really was valid. And having that entitlement, those assessments and the relief from the stay that the order gave the IRS were valid. Even if I were to believe that that order was invalid, that

it could not lift the automatic stay automatically, for all purposes, and allow the IRS to assess taxes, it's now far too late for that argument to be raised. It is now, in essence, six years after the fact, or more. And it would be unfair and untimely for this Court now to go back and determine whether or not the IRS should be held to a different standard than the one that was in effect at the time it took this action.

Accordingly, I find that those assessments were based upon a general order that was valid at the time. The assessments were and are valid, and I am unwilling to undo them at this point.

"s/RANDALL J. NEWSOME"
U. S. Bankruptcy Judge

APPENDIX B

NOT FOR PUBLICATION

FILED
MAR-4 1993
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	)	BAP No.
	)	NC-92-1745-APO
KENNETH OWEN and	)	BK. No.
MARGARET OWEN,	)	4-85-01124-WS
Debtors.	)	Adv. No.
	)	91-4466-AN
CALIFORNIA STATE BOARD	)	
OF EQUALIZATION	)	
Appellant/	)	
Cross-Appellee,	)	
v.	)	
KENNETH OWEN and	)	
MARGARET OWEN,	)	
Appellees/	)	
Cross-Appellants.	)	
	)	BAP No.
In re	)	NC-92-1746-APO
	)	BK. No.
KENNETH OWEN and	)	4-85-01124-WS
MARGARET OWEN,	)	Adv. No.
Debtors.	)	91-4466-AN
	)	
KENNETH OWEN and	)	
MARGARET OWEN,	)	
Appellants,	)	
v.	)	
INTERNAL REVENUE	)	
SERVICE	)	MEMORANDUM
Appellee	)	

Argued and Submitted on
January 21, 1993 at
San Francisco, California

Filed - MAR 4 1993

Appeal from the United States
Bankruptcy Court for the
Northern District of California

Honorable Randall J. Newsome,
Bankruptcy Judge, Presiding

Before: ASHLAND, PERRIS, and OLLASON,
Bankruptcy Judges.

STATEMENT OF THE CASE

Debtors Kenneth and Margaret Owen filed a Chapter 7 petition on April 8, 1985. Before final discharge, two creditors, California State Board of Equalization and the Internal Revenue Service, rendered assessment of taxes against the Owens. The Owens asserted in an adversary complaint filed on October 2, 1991, that both assessments violated the automatic stay pursuant to 11 U.S.C. section 362(a)(6). The court ruled in

favor of the Owens as to the California State Board of Equalization assessment but against the Owens as to the Internal Revenue Service assessment.

The State of California appeals from that portion of the judgment finding that their tax assessment violated the Owens' automatic stay and that they are now barred by the statute of limitations from reassessing the taxes. The Owens cross appeal from that portion of the judgment denying them actual damages for the State Board of Equalization wilfully violating the automatic stay. The Owens also appeal that portion of the judgment finding that the IRS tax assessment did not violate the Owen's automatic stay.

STATEMENT OF FACTS

The Owens filed a Chapter 7 petition on April 8, 1985. In their payment schedules, the debtors listed the IRS as a priority creditor for unpaid payroll

withholding taxes in the sum of $18,296.44 and listed the Board of Equalization as a priority creditor for unpaid state sales taxes.

Prior to the Owens' discharge, the IRS issued an assessment against them. The assessment was made pursuant to General Order #4. The order modified the stay to permit the IRS to assess certain taxes.

On August 13, 1985, the Owens received a final discharge of their Chapter 7 case. Subsequently, the IRS recorded liens against the Owens' property pursuant to the assessment made during the bankruptcy. The IRS then began levying upon, and attempting to seize, the Owens' property.

The Owens contend that General Order #4 was at all times invalid. Consequently, the assessment was in violation of the automatic stay. They also contend that the statute of

limitations for assessing taxes has run and thus the IRS is barred from issuing a new assessment. The statute of limitations pursuant to section 6501(a) of the Internal Revenue Code provides that assessments shall be issued three years from the date of filing the return. Pursuant to section 6503(i) of the IRC, the statutory period shall be suspended during the time a debtor's assests are under the jurisdiction of the bankruptcy court, plus 60 days. Here, final discharge was granted on August 13, 1985. The statutory period runs through October 12, 1988.

As for the California State Board of Equalization matter, on April 26, 1985, the Owens filed self-declared quarterly sales and use tax returns for the third and fourth quarters of 1985 and the first quarter of 1986. These returns were filed late without remittance. Pursuant to California Revenue and Tax Code

section 6757, when the sales tax becomes due, a perfected and enforceable state tax lien arises automatically. This lien arose while the Owens were in bankruptcy.

Moreover, the California Revenue and Tax Code authorizes the state to collect delinquent taxes at any time within three years after the tax becomes due. The statute of limitations would thus run in 1988.

STANDARD OF REVIEW

Issues of statutory interpretation are reviewed de novo. In re King, 962 F.2d 1423 (9th Cir. 1992). Factual findings by the bankruptcy court are reviewed for clear error. A finding of fact is clearly erroneous when after reviewing the evidence, we are left with the definite and firm conviction that a mistake has been committed. In re Bradford, 112 B.R. 347 (9th Cir. BAP 1990).

ISSUES

1. Whether a tax assessment by the IRS was in violation of the automatic stay and void.

2. Whether the IRS may reissue the tax assessment or is barred by the statute of limitations.

3. Whether a tax assessment by the California State Board of Equalization was in violation of the automatic stay and void.

4. Whether the California State Board of Equalization may reissue the tax assessment or is now barred by the statute of limitations.

5. Whether the debtors are entitled to actual damages from the California State Board of Equalization pursuant to section 362(h).

DISCUSSION

I. The Owens argued in their

complaint that the tax claims are invalid because they stem from a tax assessment issued pursuant to General Order #4. According to General Order #4, a tax assessment was issued against debtors in the Northern District of California during their bankruptcy. The Owens contend that before assessing taxes, General Order #4 failed to provide notice and a hearing pursuant to 11 U.S.C. section 362(d). Therefore, the tax assessment was a violation of the automatic stay and void. Consequently, all claims that derive from the tax assessment is invalid and dischargeable.

General Order #4 was originally enacted to expedite relief from stay hearings. It granted the IRS relief from the automatic stay to assess voluntarily agreed to tax liabilities.

General Order #4 was adopted by the District Court for the Northern District of California pursuant to powers afforded

by Federal Rule of Bankruptcy Procedure 9029. Federal Rule of Bankruptcy Procedure 9029 states in pertinent part:

> Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms.

Here, the district court judges from the Northern District of California signed General Order #4 to modify the stay automatically. The order was in effect from January 8, 1982 though May 20, 1986 when it was repealed.

The Owens contend that while in effect, the order invalidly modified the automatic stay. Federal Rule of Bankruptcy Procedure 9029 clearly states that local rules may not be established which are inconsistent with the Federal Rules of Bankruptcy Procedure. This requirement is well established in case law by the Ninth Circuit. "Bankruptcy

Rule 9029 allows for the making of local bankruptcy rules so long as they are not 'inconsistent' with the more general bankruptcy rules." In re Bersher Investments, 95 B.R. 126, 129 (9th Cir. BAP 1988).

Moreover, local rules "are for the court's convenience and do not affect the substantive nature of the documents themselves." In re Sackett, 135 B.R. 453, 455 (N.D.N.Y. 1992) In re Walat provides an exhaustive explanation of the creation of Fed.R.Bankr.P. 9029 via 28 U.S.C. section 2075 by which Congress delegated to the Supreme Court certain powers for cases under title 11. In re Walat, 87 B.R. 408 (Bankr.E.D. Va. 1988), aff'd, 89 B.R. 11 (E.D. Va. 1988); see Knox v. Lines, 463 F.2d 561 (9th Cir. 1972); see In re C.S. Crawford & Co., 423 F.2d 1322 (9th Cir. 1970). "under this authority, the Supreme Court has issued Bankruptcy Rules." In re Walat, 878 B.R.

at 410. As a result:

> Local rules may not rise higher than the bankruptcy court's derivative power. Therefore, L.R. 313(A) cannot (1) abridge, enlarge or modify any substantive right established by the Constitutiion or the Bankruptcy Code, (2) be classified as anything other than practice or procedure, not (3) be inconsistent with the national Bankruptcy Rules.

In re Walat, 87 B.R. at 411 (citing 28 U.S.C.A. section 2075) (emphasis added).

To determine whether the right is procedural or substantive, the "test is whether the rule will operate to abridge, enlarge, or modify the rules of decision by which the court will adjudicate the parties' rights." In re Walat, 87 B.R. at 411 (quoting Bonner v. Adams, 734 F.2d 1094, 1102 (5th Cir. 1984)).

In addition, rules "promulgated under 28 U.S.C. section 2075 are entitled to a presumption that they were promulgated with the proper authority and do not affect substantive right." In re Walat, 87 B.R. at 411. Consequently:

> [s]ince this presumption attaches to rules under 28 U.S.C. section 2075 and the bankruptcy court's rule making authority stems from that statute, we are persuaded that this presumption should be applied to this Court's derivative rule making power. Therefore, the parties objecting to a local rule as a substantive change in bankruptcy law . . . have a heavy burden to prove their case.

In re Walat, 87 B.R. at 408 (quoting In re Management Data Services, Inc.,43 B.R. 962, 966 (W.D. Wash. 1984)).

Here, the Owens contend that General Order #4 was both inconsistent with the federal bankruptcy rules and interfered substantively with their rights. Regarding inconsistency with general bankruptcy rules, the Owens contend that General Order #4 is inconsistent with Fed.R.Bankr.P. 4001 and 9014. General Order #4 states in pertinent part:

> Ordered that the Internal Revenue Service be and is hereby authorized to assess voluntarily agreed to tax liabilities; make refunds to debtors who have cases filed in this District, except those refunds which are property of the bankruptcy estate and are claimed by the trustee within the thirty day period commencing with the

> date set for the section 341 Hearing; and offset against any refund due a debtor any taxes due the United States.
>
> Further ordered that the stay afforded by 11 U.S.C. section 362 be and is hereby automatically modified herein in any case filed in this District, unless otherwise orderd by this Court.

This order provides for automatic modification of the stay allowing the IRS to assess voluntarily agreed to tax liabilities. Fed.R.Bankr.P. 4001 states that relief from stay must be obtained through a motion. It does not state that an order may automatically provide such relief. Moreover, Fed.R.Bankr.P. 4001(d)(1)(C) states in pertinent part:

> A motion for approval of an agreement stay provided for in section 362 . . the agreement.

Accordingly, to modify the automatic stay, the moving party must submit a motion requesting the modification. Where an agreement is entered into, the motion must be accompanied by a copy of the actual agreement. There is no

evidence that General Order #4 followed these requirements. Instead, the order automatically modified the stay circumventing the procedures clearly enumerated in Fed.R.Bankr.P. 4001.

In addition, pursuant to 11 U.S.C. section 362(d), a modification of the stay shall occur only after notice and a hearing. General Order #4 ignores this text. Instead, according to General Order #4, no motion, no notice, and no hearing is required before the stay is modified. Consequently, General Order #4 is procdedurally inconsistent with the general bankruptcy rules and the specific requirements of section 362(d).

Substantively, the IRS assessed tax liabilities were a violation of the Owens' rights under the Bankruptcy Code. Pursuant to section 362(a)(6), the filing of a petition under the Bankruptcy Code operates as a stay of:

any act to collect, assess, or recover

> a claim against the debtor that arose before the commencement of the case under this title . . .

General Order #4 permitted the IRS to assess taxes before meeting the requirements of section 362(d). This constitutes a violation of the automatic stay. As the Ninth Circuit has stated: "A tax assessment is a substantive violation of the automatic stay which creates a lien on all the debtor's property." In re Schwartz, 954 F.2d 569, 575 (9th Cir. 1992). Consequently, the Owens have met their burden in proving that General Order #4 violated one of their substantive rights under the Bankruptcy Code--the right to have tax assessments stayed if, and until, relief from stay is granted.

The bankruptcy court alluded to this in its findings of fact and conclusions of law by stating:

> [N]o matter what hindsight may say about the validity of that order or the wisdom of putting it into effect,

> it was in effect, and no one challenged its validity at the time . . . . Even if I were to believe that that order was invalid, that it could not lift the automatic stay automatically, for all purposes, and allow the IRS to assess taxes, it is now far too late for that argument to be raised.

(E.R. P. 25-26) (emphasis added). The bankruptcy court seemed to understand that the order was improper, but failed to conclude that assessing the taxes was in violation of the automatic stay and thus void. In re Schwartz, 954 F.2d 569 (9th Cir. 1992).

As the Ninth Circuit explained, "courts have long stated that violations of the automatic stay are void and of no effect." In re Schwartz, 954 F.2d 572. Accordingly, the Owens are not barred from presently raising the issue in their complaint: the act has no effect. For instance, in In re Schwartz, 954 F.2d 569 (9th Cir. 1992) the debtors waited approximately four years before objecting to the IRS claim.

If the IRS tax assessment violated the automatic stay and is void, the question then is whether the resulting tax claims are valid. This issue was also cleanly dispensed with by the Ninth Circuit which stated "[i]f violations of the automatic stay are void, the IRS tax assessment made against the Schwartzes in the Chapter 11 bankruptcy is without effect." In re Schwartz, 954 F.2d at 571 (emphasis added).

For their part, the IRS provided little defense to the Owens' appeal. Relying on case law for the proposition that judicial law cannot have a retroactive effect, the IRS concluded that they had a right to rely on the assessment. Whether this is true or not need not be determined; the underlying act was void and without effect.

Moreover, the IRS incorrectly, conluded:

> [E]ven if this court should find the general order invalid . . . this court should rely on the Bankruptcy

> Court, that the United States was entitled to rely on the Bankruptcy Court's general order, and refuse to retroactively invalidate the general order modifying the automatic stay.

(Appellee's brief p. 4). In this passage, the IRS alluded to the fact that General Order #4 violated the stay. They rested their case, however, on the erroneous conclusion that the only method for addressing this issue was through retroactive relief. Instead, as the Ninth Circuit concluded, where an act is void, there is no need for retroactiove relief. See In re Schwartz, 954 F.2d 569(9th Cir. 1992).

In addition, the Owens request a determination that the statute of limitations has run leaving the IRS barred from reassessing the Owens for the underlying taxes. The panel may not entertain this request because the issue is not ripe and thus the panel does not have jurisdiction to hear the matter. In re Howes, 89 B.R. 77 (9th Cir. BAP 1988).

The isuue is not ripe because it "involves uncertain and contingent future events that may not occur as anticipated, or indeed, may not occur at all." In re Howes, 89 B.R. at 79. At present, no evidence has been introduced that the IRS will attempt to reassess the taxes. As the Supreme Court has stated:

> To be a proper matter for us to resolve, an appeal must be definite and concrete, touching the legal relations of parties having adverse legal interest. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-241 (1937) (citations omitted). Here, there is no definite and concrete controversy regarding the statute of limitations. Without the IRS first reissuing an assessment, the panel has no basis to determine the matter.

II. The next matter to be

determined is whether the bankruptcy court correctly concluded that the tax assessment by the California State Board of Equalization issued against the Owens during their bankruptcy was a violation of the automatic stay. Pursuant to the California Revenue and Taxation Code section 6757:

> [W]hen a person fails to pay the amount disclosed on a return filed on or after the date the return is delinquent, that amount is deemed due and payable on the date the return is received by the Board and as of that date a perfected and enforceable state tax lien arises by operation of law with respect to the amount, including penalties and interests therein.

Cal.Rev.&Tax Code section 6757 (emphasis added). Accordingly, the bankruptcy court reasoned that:

> The Bankruptcy Appellate Panel and the Ninth Circuit stated that to assess refers to a formal act of fixing tax liability, and noted that a tax statue that immediately imposed a tax lien is an assessment. This is exactly what we have here. (E.R. p. 24).

As a result, the bankruptcy court

concluded that the assessment and tax lien violated 11 U.S.C. section 362(a)(6). We agree with the bankruptcy court's conclusion. The State Board's assessment was in violation of the automatic stay. However, there is a question as to whether this tax assessment is exempted by 11 U.S.C. section 362(b). Pursuant to 11 U.S.C. section 362(b)(9):

> The filing of a petition . . . does not operate as a stay . . . of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

Where the tax assessment concerns a tax deficiency, circuits have held that such an assessment "does not violate the automatic stay by auditing a debtor . . . and then issuing a notice of audit assessment." H & H Beverage Distrib. v. Department. of Revenue of PA., 850 F.2d 165, 169 (3rd Cir. 1988), cert. denied, H & H Beverage Distrib. v. Dept. of Revenue of PA., 488 U.S. 994 (1988).

In H & H Beverage Distrib, 850 F.2d 165 (3rd Cir. 1988), the Commonwealth of Pennsylvania conducted a sales tax audit and issued a notice of audit assessment against the debtor. The court reasoned that "although issuance of an audit assessment was a step toward the creation of a lien, it was expressly permitted under section 362(b)(9)." H & H Beverage Distrib, 850 F.2d at 165.

H & H contended that even if the stay does not apply to the audit, "issuance of the notice of audit assessment was void because it would automatically result in imposition of a lien in favor of the Commonwealth." H & H Beverage Distrib, 850 F.2d at 167. The court reasoned, however, that section 362(b)(9) does not bar the notice of tax deficiency."Thus, although a governmental unit may not collect taxes or create a lien during the stay, it may notify a debtor of a tax deficiency." H & H

Beverage Distrib, 850 F.2d at 167 (3rd Cir. 1988).

After reasoning that the section 362(b)(9) exemption has its origins in the federal tax system, the court compared Pennsylvania law with the federal taxing procedures. The court's conclusion states in pertinent part:

> the Commonwealth could not create a lien until it made a formal demand for the full amount due upon completion of the appeal and then filed the amount of that liability. Pursuant to section 362, these are the acts that would violate the stay notice of audit assessment is the functional equivalent of the notice of tax deficiency, and pursuant to section 362(b)(9), it is expressly permitted during the pendency of an automatic stay.

H & H Beverage Distrib, 850 F.2d at 169 (emphasis added)

Pursuant to the California Revenue and Taxation Code section 6757, not only is an assessment issued when the delinquent tax return is received, but a perfected and enforceable lien is automatically created. Cal. Rev. & Tax

Code section 6757. Therefore, the delinquent assessment is a violation of the automatic stay. This was the Ninth Circuit's holding in In re Schwartz: "[A] tax assessment is a substantial violation of the automatic stay which creates a lien on all of the debtor's property." In re Schwartz, 954 F.2d 569, 575 (9the Cir. 1992). Therefore, section 362(b)(9) does not apply here. The State Board's assessment and automatic lien issuance go well beyond the notice of delinquency provided for in the exemption.

This conclusion is in accord with another recent Ninth Circuit decision In re King, 961 F.2d 1423 (9th Cir. 1992). In In re King, the Ninth Circuit concluded that "[t]he determination of the precise date of assessment should be accomplished by reference to the specific tax code and practices involved." In re King, 961 F.2d at 1427. Here, pursuant

to the California Revenue and Tax Code, an assessment is issued upon the return of the delinquent tax return and perfected an enforceable tax lien automatically arises. Cal. Rev. & Tax Cod section 6757.

The State Board's sole argument is that the holding in In re King is limited to sections 523(a)(1)(A) and 507(a)(7). This is an erroneous claim. The same reasoning exercised in In re King applies here. In In re King, the Ninth Circuit reasoned that"it appears that 'to assess' refers to a formal act of fixing of tax liability, and that this act comes after the calculation is completed but may be before the amount is due and payable." In re King, 961 F.2d at 1427 (9th Cir. 1992). Here, not only was the amount in question calculated, but pursuant to the California Revenue and Tax Code an automatic lien arose. Cal. Rev. & Tax Code section 6757. This procedure

directly conflicts with the language of section 362(a)(4-6) and the holdings in both In re Schwartz and In re King. As a result, the State Board's tax assessment and lien violate the automatic stay.

Regarding the statute of limitations, acts in violation of the stay are void and have no effect. In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). Consequently, for the Board of Equalization to recover, they are required to reassess the taxes. Yet, this act is barred by the statute of limitations pursuant to section 6711 of the California Revenue and Tax Code. According to section 6711, the state has three years to collect the taxes from the time they are due or within the period during which a lien is enforced as a result of the recording or filing of a tax lien notice. Cal. Rev. & Tax Code section 6711. Therefore, the trial court correctly concluded that "[s]ince no lien

was ever enforced, the State Board is limited to the three year period after the tax became due and payable. The statute ran in 1988." (E.R. p. 25).

As a result, we agree with the bankruptcy court's conclusion that the tax assessments and lien which arose pursuant to California Tax and Revenmue Code section 6757 were in violation of the automatic stay. We futher agree that the State Board is now barred from reissuing the assessments.

The Owens also cross-appealed the denial of actual damages pursuant to 11 U.S.C. section 362(h). Section 362(h) states:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

The Ninth Circuit has clearly defined wilful as used in section 362(h):

> A "willful violation" does not require a specific intent to violate

> the automatic stay. Rather the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded.

In re Bulson, 117 B.R. 537, 539 (9th Cir. BAP), aff'd, 974 F.2d 1341 (9th Cir. 1991) (citing In re Bloom, M.D., 875 F.2d 224, 227 (9th Cir. 1989)).

Here, the Board of Equalization sent out a demand letter to recover delinquent taxes. The board, however, made an offer of proof that the letter was inadvertently sent. According to their testimony, certain divisions of the Board had no notice of the Owens' pending bankruptcy. As a result, the letter was sent.

Here, the bankruptcy court dismissed the issue explaining that the letter was inadvertently sent. This finding is clearly erroneous. The panel has

addressed this issue in In re Bulson, 117 B.R. 537, 539 (9th Cir. BAP 1990). In In re Bulson, an employee of the IRS contacted the bankruptcy court's Chapter 13 office and was informed that a particular bankruptcy plan was completed. After assuming that the case was closed, the technician sent the debtor Notice of Intention to Levy. The panel concluded that:

> The action by the IRS was clearly directed at collection of the tax debt and therefore was intentional. The IRS had notice of and participated in the bankruptcy case, so that it had knowledge of the automatic stay. The fact that the IRS may have been mistaken about the status of the case, or believed it had right to execute on the debtor's property does not make the act of collection non-willful.

In re Bulson, 117 B.R. at 539; see also In re Allen, 83 B.R. 678, 680-681, (Bankr. E.D. Mo. 1988).

Here, although one branch of the Board may have been ignorant of the stay, the Board itself has acknowledged that

they knew of the stay. The Board went to great detail in their testimony to explain that after receiving notice of the bankruptcy, it was distrubuted to the proper authorities. As In re Bulson explains, "a mistake about the status of a case does not make the act non-willful." In re Bulson, 117 B.R. at 539. Thus, the Board's failure to properly notice all their divisions does not negate the act. The Board intentionally violated the automatic stay upon sending the demand letter.

CONCLUSION

In conclusion, we reverse the bankruptcy court's decision concerning the IRS tax assessment. The IRS tax assessment violated the automatic stay and is void. As such, the resulting tax claims are invalid. Yet, there is no definite and concrete controversy concerning whether the statute of limitations has run on the IRS's claims.

Accordingly, we cannot rule on that issue.

We remand this case, however, to permit the bankruptcy court the opportunity to annul the automatic stay to grant relief to the IRS on equitable grounds. See Olson v. U.S., 133 B.R. 1016, (D. Neb. 1991); see also In re Schwartz, 954 F.2d 569 (9th Cir. 1992) (permitting retroactive relief from the stay).

As for the California State Board of Equalization, we affirm the bankruptcy court's decision that the State Board's tax assessments violated the automatic stay. We also affirm the bankruptcy court's decision that the State Board is now barred from reassessing the taxes.

We also remand this case for the bankruptcy court to determine actual damages pursuant to 11 U.S.C. section 362(h) for the State Board's wilful violation of the Owens' automatic stay.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: KENNETH OWEN; MARGARET OWEN, Debtors,	Nos. 93-15907 93-15920 BAP No. NC-92 -01746-APO
UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Plaintiff-Appellant Cross-Appellee, v. KENNETH OWEN and MARGARET OWEN Defendant-Appellee Cross-Appellant.	FILED DEC 06 1994 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS MEMORANDUM*

Appeal from the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals
Ollason, Perris, and Ashland Judges, Presiding

Argued and Submitted November 14, 1994
San Francisco, California

Before: ALARCON and HALL, Circuit Judges, and KING,**District Judge.

For the reasons set forth in the Bankruptcy Appellate Panel's unpublished opinion, we AFFIRM.

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* This dispositon is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: KENNETH OWEN; MARGARET OWEN, Debtors,	Nos. 93-15907 93-15920 BAP No. NC-92 -01746-APO
UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Plaintiff-Appellant Cross-Appellee, v. KENNETH OWEN and MARGARET OWEN Defendant-Appellee Cross-Appellant.	FILED FEB -3 1995 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS ORDER

Before: ALARCON and HALL, Circuit Judges, and KING,*District Judge.

The request for publication filed on January 23, 1995, is hereby DENIED.

* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE: KENNETH OWEN; MARGARET OWEN, Debtors,	)	Nos. 93-15907 93-15920 BAP No. NC-92 -01746-APO
UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Plaintiff-Appellant Cross-Appellee, v. KENNETH OWEN and MARGARET OWEN Defendant-Appellee Cross-Appellant.	)	FILED MAR -9 1995 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS
	)	ORDER

Before: ALARCON and HALL, Circuit Judges, and KING,*District Judge.

The panel has voted to deny appellees' petition for rehearing of its February 3, 1995, order. Judge Hall has voted to reject the suggestion for rehearing en banc and Judges Alarcon and King recommend rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX F

NINTH CIRCUIT RULES

CIRCUIT RULE 36-1

OPINIONS, MEMORANDA, ORDERS; PUBLICATION

Each written dispositon of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

CIRCUIT RULE 36-2

CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a

lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

CIRCUIT RULE 36-3

OTHER DISPOSITIONS

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

CIRCUIT RULE 36-4

REQUEST FOR PUBLICATION

Publication of any unpublished dispositon may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this Court's disposition. A copy of the request for publication must be served on the parties to the case. The parties will have 10 days from the date of service to notify the Court of any objections they may have to the publication of the disposition. If such a request is granted, the unpublished dispositon will be redesignated an opinion.